No. 93-1151

In The

Supreme Court of the United States

October Term, 1994

FEDERAL ELECTION COMMISSION,

Petitioner,

v.

NRA POLITICAL VICTORY FUND, et al.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit

BRIEF FOR RESPONDENTS

CHARLES J. COOPER*
MICHAEL A. CARVIN
WILLIAM L. MCGRATH

SHAW, PITTMAN, POTTS &
TROWBRIDGE
2300 N Street, N.W.
Washington, D.C. 20037
(202) 663-8000

* Counsel of Record

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QUESTIONS PRESENTED

1. Whether the Federal Election Commission lacks authority to bring this enforcement action on the ground that section 437c(a)(1) of the Federal Election Campaign Act violates the separation of powers by directing that the Secretary of the Senate and the Clerk of the House of Representatives (or their designees) shall serve as *ex officio*, nonvoting members of the Commission.

2. Whether the Federal Election Commission lacks authority to bring this enforcement action on the ground that the Federal Election Campaign Act unconstitutionally interferes with the President's duty to "take Care that the Laws be faithfully executed" by vesting law enforcement authority in principal officers over whom the President has no removal authority.

3. Whether the Federal Election Commission lacks authority to bring this enforcement action on the ground that section 437c(a)(1) of the Federal Election Campaign Act, which provides in part that "[n]o more than 3 members of the Commission . . . may be affiliated with the same political party," is an unconstitutional infringement upon the President's power under Article II, section 2, clause 2 of the Constitution to nominate principal officers who perform executive functions.

RULE 29.1 STATEMENT

In accordance with Rule 29.1 of the Rules of this Court, respondents are the National Rifle Association – Institute for Legislative Action ("ILA"), the NRA Political Victory Fund ("PVF"), and Grant Wills, Treasurer of the PVF. ILA is a component of the National Rifle Association, Inc., and the PVF is a separate segregated fund organized under section 441b(b)(2)(c) of the Federal Election Campaign Act. There are no other parent or subsidiary companies.

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STATEMENT OF THE CASE

Uniquely among the myriad executive and independent agencies and commissions created by Congress, the Federal Election Commission ("FEC" or "Commission") counts among its membership two congressional agents – the Secretary of the Senate ("Secretary") and the Clerk of the House of Representatives ("Clerk"), or their designees. *See* 2 U.S.C. § 437c(a)(1).[1] Prior to the 1976 amendments to the FECA, the Commission consisted of eight members: the six voting members were appointed – two each by the President *pro tempore* of the Senate, the

[1] This provision is part of the Federal Election Campaign Act ("FECA" or "the Act"), 2 U.S.C. § 431 *et seq.*

Speaker of the House of Representatives, and the President – and the Secretary and the Clerk were *ex officio* members without the right to vote.

In *Buckley v. Valeo*, 424 U.S. 1 (1976), this Court held that these constitutive provisions violated the Appointments Clause[2] of the Constitution insofar as the Commissioners were charged with performing executive functions. *Id.* at 140-41. The separation of powers challenge in *Buckley*, however, was directed only at the four congressionally appointed, voting members of the Commission, so the Court did not address the constitutional status of the *ex officio* members. Following *Buckley*, Congress reconstituted the FEC such that it is now "composed of the Secretary of the Senate and the Clerk of the House of Representatives or their designees, ex officio and without the right to vote, and 6 members appointed by the President, by and with the advice and consent of the Senate." 2 U.S.C. § 437c(a)(1). Congress thus left intact the provision of the original statute placing two of its agents on the Commission.[3] The central issue in this

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[2] U.S. Const. Art. II, § 2, cl. 2.

[3] While this Court's holding in *Buckley* did not require Congress to reconsider its decision to place these *ex officio* members on the FEC, Congress was not unaware of their contested constitutional status. Testifying before a Senate subcommittee in the wake of *Buckley*, then-Assistant Attorney General for the Office of Legal Counsel Antonin Scalia noted the Ford Administration's view that the nonvoting, *ex officio* members ought not be restored to the reconstituted Commission:

> We believe that the spirit of the [*Buckley*] opinion, and even the letter of the Constitution, require this result. The connection of these two officers to the legislative branch is even closer than that of the present congressionally appointed members who have the right to vote. They are not only *appointed* by Congress, but *paid* by it and *removable* by it. We believe that the absence of voting power is not determinative for constitutional purposes. The power to be present and to participate in discussions is the power to influence.

Federal Election Campaign Act Amendments: Hearing Before the Subcomm. on Privileges and Elections of the Senate Comm. on Rules and Administration, 94th Cong., 2d Sess. 119 (1976) (emphasis in original). Congress plainly took note of – though it did not heed – the Administration's warning. *See, e.g.*, 122 Cong. Rec. 6940 (1976) (Sen. Griffin).

case is whether that provision violates the Constitution's separation of powers.

1. In March and July 1988, respondent National Rifle Association Political Victory Fund ("PVF"), a separate segregated fund established by the National Rifle Association ("NRA") pursuant to section 441b(b)(2)(C) of the Act, made two nationwide mailings to NRA members to solicit contributions. Joint Appendix ("J.A.") 29. Another component of the NRA, respondent NRA-Institute for Legislative Action ("ILA"), which operates from a bank account separate and segregated from both the NRA and the PVF and is prohibited by the NRA's bylaws from making political contributions, J.A. 26, issued a series of checks to vendors to cover the production and postage costs associated with these two mailings by the PVF; ILA paid a total of $415,744.72 to cover expenses associated with the mailings. J.A. 29-31. Under the Act, a corporate entity such as the ILA, while generally prohibited from making contributions in connection with any federal election, *see* 2 U.S.C. § 441b(a), may pay for solicitation expenses incurred by a separate segregated fund such as PVF. *See* 2 U.S.C. § 441b(b)(2)(C).

On August 1, 1988, the PVF reimbursed the ILA for the $415,744.72 of costs for the March and July 1988 PVF solicitation mailings that had been paid by the ILA. J.A.

31. On October 20, 1988, after Grant A. Wills, the Treasurer of the PVF, the Fiscal Officer of the ILA, and a respondent in this case, determined that the PVF had prematurely decided to reimburse the ILA, the ILA returned the entire amount of the reimbursement to the PVF. J.A. 31. Respondent Wills believed that because the PVF was under no obligation to reimburse the ILA for the payments in the first instance, there could be no prohibition against the ILA subsequently returning that reimbursement to the PVF. J.A. 31-32. The PVF duly reported the October 20, 1988, transaction to the FEC, whereupon the Commission began the administrative proceedings that led ultimately to this case. J.A. 32.

2. In October, 1989, the Commission found "reason to believe," 2 U.S.C. § 437g(a)(2), that the October 20, 1988, return of the reimbursement from the ILA to the PVF violated the Act's prohibition against corporate contributions. 2 U.S.C. § 441b(a); *see* J.A. 9. After further investigation, the FEC ruled on April 24, 1990, that there was probable cause to believe that such a violation had occurred. J.A. 10. When conciliation efforts failed, the Commission voted on September 18, 1990, to initiate this civil enforcement action against respondents. J.A. 10. The Complaint was filed on December 20, 1990. J.A. 13.

3. Respondents asserted both statutory and constitutional defenses to the FEC's allegations. J.A. 14-22. Specifically, respondents' denied that their conduct had violated the statute and contended that, in any event, the FEC lacked constitutional authority to maintain this enforcement action because (1) the membership of the *ex officio* congressional members on the Commission violates the separation of powers doctrine, J.A. 16-17; (2) the Commission's statutory bipartisan appointment requirement violates the Appointments Clause, J.A. 17; and (3)

the establishment of an agency with executive enforcement authority whose members are not subject to removal by the President violates the separation of powers. J.A. 17. On cross-motions for summary judgment, the district court held that the October 20, 1988, transaction constituted a corporate contribution prohibited by section 441b(a), and either rejected or refused to address respondents' constitutional defenses. Appendix to the Petition ("Pet. App.") 19a-28a. On December 11, 1991, the district court ordered that the respondents pay a civil penalty in the amount of $40,000. Pet. App. 35a.

4. On October 22, 1993, the United States Court of Appeals for the District of Columbia Circuit reversed, Pet. App. 1a-18a, holding that the FEC's composition violates the separation of powers.[4] The court concluded that the challenge to the bipartisan appointment requirement is nonjusticiable, and it rejected on the merits the claim based on the Commission's independence from executive control. With respect to the FEC's ex officio congressional members, however, the court of appeals

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[4] By deciding the constitutional issues before addressing respondents' statutory argument, the court of appeals knowingly departed from the general rule that federal "courts should 'refrain from passing on the constitutionality of an act of Congress unless obliged to do so.'" Pet. App. 4a (quoting *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 341 (1936) (Brandeis, J., concurring) (quoting *Blair v. United States*, 250 U.S. 273, 279 (1919))). The FEC does not challenge this aspect of the decision. Moreover, the court of appeals was correct in holding that this "prudential rule of avoiding constitutional questions," *Zobrest v. Catalina Foothills School Dist.*, 113 S.Ct. 2462, 2466 (1993), does not apply when, as in this case, "plaintiffs challenge[] the constitutional composition or character of a tribunal . . . . " Pet. App. 5a (citing *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 859 (1986), and *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 56, 87 (1982)).

held that "the mere presence of agents of Congress on an entity with executive powers offends the Constitution." Pet. App. 15a. While acknowledging that Congress "enjoys ample channels to advise, coordinate, and even directly influence an executive agency," Pet. App. 16a, the court concluded: "What the Constitution prohibits Congress from doing, and what Congress does in this case, is to place its agents beyond the legislative sphere by naming them to membership on an entity with executive powers." Pet. App. 16a.

The court of appeals then rejected the Commission's argument, based upon *Buckley*, that the court ought to validate, under the *de facto* officer doctrine, the Commission's constitutionally unauthorized actions taken in connection with this enforcement action. Noting that respondents' constitutional challenge arises as a defense to a civil enforcement action, the court held that it was "aware of no theory that would permit us to declare the Commission's structure unconstitutional without providing relief to the appellants in this case." Pet. App. 18a.

The FEC filed a petition for a writ of certiorari on January 18, 1994. The Court granted the petition on June 20, 1994.

SUMMARY OF ARGUMENT

1. As an initial matter, respondents are bound to note that the petition for certiorari in this case may have been filed jurisdictionally out-of-time. While the petition was filed by the FEC within the statutory time limit, the Solicitor General did not authorize the filing until some four months after that deadline had passed. If the Solicitor General is right that the FEC may not represent itself before this Court without his authorization, then we believe that the petition was not timely filed.

2. The court of appeals correctly held that the statutorily mandated *ex officio* membership of the Secretary and the Clerk on the Commission – though only in a nonvoting capacity – violates the separation of powers. By placing these congressional agents on an agency performing executive functions, Congress unconstitutionally encroached on the Executive's domain. Because the FEC thus lacked constitutional authority to prosecute this enforcement action, this case must be dismissed.

3. Both the FEC and the Solicitor General argue that even if this Court concludes that the Commission has no constitutional authority to prosecute this enforcement action, the Court should nonetheless "validate" the FEC's actions against respondents and uphold the district court's assessment of civil penalties. Three distinct theories are invoked in support of this extraordinary contention. First, they argue that this Court should apply any ruling of unconstitutionality purely prospectively, such that it will not even apply to the parties now before the Court. As we show at length, this claim, which is premised primarily upon a misreading of *Buckley v. Valeo*, 424 U.S. 1 (1976), is incompatible both with the fundamental commands of Article III and with this Court's recent cases concerning the retroactivity of judicial decisions.

In addition, the FEC and the Solicitor General argue that the Court should deem the Commission's prior actions valid under the *de facto* officer doctrine. That doctrine does not apply, however, where the putative government officer occupies an office created by an unconstitutional act, and in any case, the doctrine does not preclude a court from addressing a substantial constitutional claim.

Finally, the FEC argues that it should simply be allowed to reconstitute itself without the *ex officio* members, ratify its prior invalid actions and continue the prosecution of this enforcement action against respondents. But a reconstituted FEC may not ratify its prior actions in this enforcement action because, under venerable principles of ratification law, a successor in office that did not legally exist at the time the contested actions were taken may not ratify the actions of an unconstitutional predecessor.

Accordingly, if the Court holds that the FEC lacked constitutional authority to prosecute this enforcement action, the Court's ruling must be applied in this case, and this action must be dismissed.

4. In the event the Court holds that the presence of the *ex officio* congressional agents on the FEC does not violate the Constitution, there are two other constitutional obstacles (both presented to and ruled on by the court of appeals) to the Commission's prosecution of this action. Although the Commission possesses certain quintessentially executive powers, it is not subject to control by the President because the FECA does not provide the President with any removal authority over Commissioners. The FECA thus violates the mandate of Article II that the President "shall take Care that the Laws be faithfully executed." Moreover, because the Constitution grants Congress "no role whatsoever," *Public Citizen v. U.S. Dept. of Justice*, 491 U.S. 440, 483 (1989) (Kennedy, J., concurring), in determining whom the President may nominate to serve as a principal officer, the FECA's requirement that the membership of the Commission be perfectly bipartisan violates the President's authority under the Appointments Clause. For these additional reasons, the FEC is unconstitutional, and this case must be dismissed.

ARGUMENT

I. The Petition for a Writ of Certiorari May Have Been Filed Jurisdictionally Out-Of-Time

We are obliged at the threshold to call the Court's attention to the possibility that it lacks jurisdiction to decide this case. The FEC filed its petition for a writ of certiorari in this case on January 18, 1994, the 88th day of the 90-day time period within which a petition could be filed. By order dated March 21, 1994, this Court, on its own motion, invited the United States to file a brief addressing "[w]hether the [FEC] has statutory authority to represent itself in this case in this Court." The United States responded that under 28 U.S.C. § 518(a), the FEC may represent itself only if authorized to do so by the Solicitor General, but that the Solicitor General had, by letter dated May 26, 1994, provided the necessary authorization. Brief for the United States as Amicus Curiae (May 1994) ("U.S. Br. (May 1994)") at 13-14. This authorization did not come until over 120 days after the deadline for the filing of the petition for a writ of certiorari had passed. It is clear that the statutory time limit for filing a certiorari petition in a civil case is jurisdictional and cannot be waived by the parties or by the Court. *See Missouri v. Jenkins*, 495 U.S. 33, 45 (1990).

The Court's decision to grant the FEC's petition can be interpreted in either of two ways. First, the Court may have agreed with the FEC that the FEC has independent authority to represent itself before the Court. If so, no question concerning this Court's jurisdiction arises, for the FEC's petition was timely filed. Alternatively, the Court may have considered the Solicitor General's May 26, 1994, "authorization" letter to have obviated the need to resolve the underlying issue of the FEC's independent authority. If the latter is the case, we believe that the Court must resolve the underlying issue, for the Solicitor

General's after-the-fact "authorization" of the FEC's filing, we submit, came too late to be effective.

The question is whether the Solicitor General's attempted ratification relates back to the date of the filing of the FEC's petition. Well-settled principles governing the law of ratification require a negative answer. The governing rule is stated concisely in the Restatement (Second) of the Law of Agency: "If an act to be effective in creating a right against another or to deprive him of a right must be performed before a specific time, an affirmance is not effective against the other unless made before such time." Restatement (Second) of Agency § 90 (1957). The comments to this section make clear that "[t]he bringing of an action, or of an appeal, by a purported agent cannot be ratified after the cause of action or right to appeal has been terminated by lapse of time." *Id.* cmt. a.; *see also Wagner v. Globe*, 722 P.2d 250, 255 (Ariz. 1986). This Court long ago recognized, albeit in another context, the principle underlying this rule: "The intervening rights of third persons cannot be defeated by the ratification. In other words, it is essential that the party ratifying should be able not merely to do the act ratified at the time the act was done, *but also at the time the ratification was made.*" *Cook v. Tullis*, 85 U.S. (18 Wall.) 332, 338 (1874) (emphasis added). Here, there is no question that the Solicitor General could not have filed a certiorari petition on May 26, 1994, four months late.[5]

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[5] If the Solicitor General is empowered to retroactively authorize an otherwise unauthorized petition for certiorari after the filing deadline has passed, he would, in effect, be empowered unilaterally to extend by days, weeks, or even months the statutory deadline for filing certiorari petitions. Such a result would be inconsistent with the need for "bright-line" rules, easily applied, governing the time limits for invoking this Court's jurisdiction. *Cf. Budinich v. Becton Dickinson and Co.*, 486 U.S. 196, 202 (1988) ("The time of appealability, having jurisdictional consequences, should above all be clear.").

Accordingly, should the Court decide that the FEC lacks authority to represent itself before this Court (and we endorse the Solicitor General's submission on this issue), it should also decide that the Solicitor General's attempt to authorize retroactively the FEC's filing is invalid, and that the petition should therefore be dismissed for lack of jurisdiction. *Cf. United States v. Providence Journal Co.*, 485 U.S. 693, 699 (1988).[6]

II. The Court of Appeals Correctly Held That the Composition of the FEC Violates the Constitution's Separation of Powers.

1. Put starkly, the constitutional issue posed by the *ex officio*, nonvoting membership of the Secretary and the Clerk on the FEC is this: Is the Congress constitutionally free to place its agents at conference tables throughout the executive branch and in the independent agencies, not just to eavesdrop, but to participate fully and directly in the agency's internal deliberations concerning purely

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[6] Apparently recognizing the timeliness issue presented by his attempted retroactive authorization, the Solicitor General cites two cases as support for the action. U.S. Br. (May 1994) at 13-14. Neither case, however, is on point. The first, *United States v. Winston*, 170 U.S. 522 (1898), did not involve a jurisdictional question at all, but rather dealt with whether a district attorney who represented the government in an appellate proceeding when authorized to do so by the Attorney General was entitled to extra compensation. And in *Hogg v. United States*, 428 F.2d 274, 277-80 (6th Cir. 1970), *cert. denied*, 401 U.S. 910 (1971), the court of appeals held that a United States Attorney *did* have authority to file a notice of appeal without the explicit authorization of the Solicitor General.

executive functions? We, joined now by the Solicitor General, Brief for the United States as Amicus Curiae ("U.S. Br.") at 9-23, respectfully submit that the answer to this question must surely be no.

In *Buckley*, this Court emphasized that certain functions statutorily assigned to the FEC are purely executive in nature. The Commission's civil law enforcement authority, for example, is quintessentially and exclusively an executive function:

> The [FEC's] enforcement power, exemplified by its discretionary power to seek judicial relief, is authority that cannot possibly be regarded as merely in aid of the legislative function of Congress. A lawsuit is the ultimate remedy for a breach of the law, and it is to the President, and not to the Congress, that the Constitution entrusts the responsibility to "take Care that the Laws be faithfully executed." Art. II, § 3.

Buckley, 424 U.S. at 138.[7]

Because the Commission performs certain purely executive functions, there is no doubt, and the Commission does not dispute, that Congress could not have

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[7] In addition to these enforcement responsibilities, the *Buckley* Court held that each of "the Commission's broad administrative powers," including "rulemaking, advisory opinions, and determinations of eligibility for funds and even for federal elective office itself . . . represents the performance of a significant governmental duty exercised pursuant to a public law." *Buckley*, 424 U.S. at 140-41. "These administrative functions may . . . be exercised only by persons who are 'Officers of the United States.'" *Id.* at 141. At the same time, the Court held that the FEC also performs some nonexecutive tasks that are entirely consistent with the legislative function, and which may thus be performed by an FEC that includes congressional agents. *See id.* at 138. The instant enforcement action plainly implicates the FEC's executive duties.

designated its agents as voting members of the Commission. *Buckley*, 424 U.S. at 141; *Bowsher v. Synar*, 478 U.S. 714, 722-727 (1986) (congressional agent, the Comptroller General, may not be authorized to execute law); *Metropolitan Washington Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 276 (1991) ("*MWAA*") ("If the power is executive, the Constitution does not permit an agent of Congress to exercise it.").

Nor can there by any doubt that in installing two congressional agents as members of the FEC, Congress intended to influence the Commission's performance of its functions, including its executive functions. The legislative history of the FECA, which is recounted in the Solicitor General's brief, U.S. Br. at 12-14, makes this clear. So does common sense. As the court of appeals noted, "we cannot conceive why Congress would wish or expect its officials to serve as *ex officio* members if not to exercise *some* influence." Pet. App. 13a (emphasis in original).

2. The Commission defends the *ex officio* members as a salutary congressional effort to facilitate interbranch dialogue and cooperation. The presence of the *ex officio* commissioners, says the FEC, merely provides an opportunity "for members of one branch to seek to influence another branch's exercise of its own constitutional powers by the mere persuasiveness of their advice or views." Brief for Petitioner Federal Election Commission ("FEC Br.") at 22-23. According to the Commission, the membership of the congressional agents on the Commission would violate the separation of powers only if they were empowered to "exercise control or coercive power over the actions" of the agency or could otherwise "prevent[ ] the Executive Branch from accomplishing its assigned functions." *Id.* at 25.

To be sure, this Court's separation of powers decisions have made clear that the Constitution forbids

arrangements in which Congress seeks to exercise determinative or coercive authority over executive functions.[8] But nothing in those decisions suggests that such coercive influence is a *sine qua non* of a constitutional violation. To the contrary, this Court has always been alert to the natural tendency of one branch to encroach on the domain of another. "It is this concern of encroachment and aggrandizement that has animated [the Court's] separation-of-powers jurisprudence and aroused [its] vigilance against the 'hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power.' " *Mistretta v. United States*, 488 U.S. 361, 382 (1989) (quoting *Chadha*, 462 U.S. at 951.) And Congress, as the Founders understood, "can with the greater facility, mask under complicated and indirect measures, the encroachments which it makes on the co-ordinate departments." The Federalist No. 48, at 334 (J. Cooke ed. 1961).

Under the FEC's "control or coerce" theory of the separation of powers, Congress is constitutionally free to insinuate its agents into the innermost precincts of the executive branch, to participate fully in internal deliberations concerning executive functions, and "to influence executive officials through sound advice."[9] FEC Brief at

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[8] *See, e.g., INS v. Chadha*, 462 U.S. 919 (1983) (legislative veto); *Bowsher v. Synar*, 478 U.S. 714 (1986) (statutory budget reduction authority granted to congressional agent); *MWAA*, 501 U.S. at 259-60 (members of Congress with veto power over decisions made by Airport Authority).

[9] The statutory advice-giving function vested in the *ex officio* members of the FEC may well be a function that only an "Officer of the United States" can perform. *See Public Citizen v. U.S. Dept. of Justice*, 491 U.S. 438, 465-67 (1989); *Buckley*, 424 U.S. at 125-138. If so, then the statutory membership of the Secretary and the Clerk on the FEC violates the Appointments Clause. *See id.*; U.S. Br. at 22, n.18.

25. The FEC has suggested no principled basis for stopping Congress' authority to promote interbranch dialogue short of the President's Cabinet table. Nor can the FEC's logic be confined to the executive branch. Congress has a legitimate role in monitoring the interpretation and application of federal law and, in any case, it is responsible for authorizing and appropriating funds for the federal courts. Presumably Congress, if the FEC is right, could require that one of its agents, nonvoting to be sure, sit in on this Court's deliberations.

These hypotheticals expose the fundamental flaw in the FEC's theory: encroachment does not necessarily require coercion. To the contrary, "[t]he general rule is that neither department may *invade the province* of the other *and* neither may control, direct, or restrain the action of the other." *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923) (emphasis added).

Nor is Congress' invasion of the Executive's domain by placing its agents on the FEC justified by its interest in promoting interbranch dialogue and information-gathering. As the court of appeals noted, "Congress enjoys ample channels to advise, coordinate, and even directly influence an executive agency. It can do so through direct oversight hearings, appropriation and authorization legislation, or direct communication with the Commission." Pet. App. 15a-16a (footnote omitted).[10] In any event, in *MWAA* the Court emphatically rejected a similar argument for pragmatism and flexibility in separation of powers analysis: "One might argue that the provision for

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[10] Indeed, the Act explicitly safeguards these congressional prerogatives. *See* 2 U.S.C. § 437c(b)(2) ("Nothing in this Act shall be construed to limit, restrict, or diminish any investigatory, informational, oversight, supervisory, or disciplinary authority or function of the Congress or any committee of the Congress with respect to elections for Federal office.").

a Board of Review is the kind of practical accommodation between the Legislature and the Executive that should be permitted in a 'workable government.' " *MWAA*, 501 U.S. at 276 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)). Despite the possibility that the congressional Board of Review "might prove to be innocuous," the *MWAA* Court instead saw in that arrangement "a blueprint for extensive expansion of the legislative power beyond its constitutionally-confined role," and so held that the statute violated the separation of powers. *Id.*

Precisely the same analysis applies to the statutorily mandated placement of congressional agents on federal agencies that perform executive functions. The Commission's only argument in support of the constitutionality of the *ex officio* nonvoting membership of congressional agents on the FEC is that the arrangement is "innocuous." The court of appeals, however, properly applied this Court's precedents in holding that the Constitution does not permit such congressional incursions into the executive sphere.

3. The FEC's separation of powers theory is also at odds with related constitutional principles and doctrines. First, acceptance of the FEC's position would clearly threaten the viability of the executive privilege. This privilege, which "derive[s] from the supremacy of each branch within its own assigned area of constitutional duties," *United States v. Nixon*, 418 U.S. 683, 705 (1974), "is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." *Id.* at 708. Simply put, a statutory arrangement (like the composition of the FEC) that grants congressional officers automatic and unlimited access to all papers and conversations by executive decisionmakers necessarily and seriously threatens the executive branch's

ability to "protect[] . . . the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking." *Id.* While the court of appeals did not rely upon this rationale, this incursion on executive privilege further supports that court's ruling.

Second, there is no doubt that Congress could not place one of its members on the Commission or in any other position exercising executive authority. The Incompatibility Clause establishes a rigid and impermeable partition between the executive and legislative branches with respect to service of members of Congress in executive positions: "[N]o Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office." U.S. Const. Art. I, § 6, cl. 2. This express prohibition on direct, personal participation by members of Congress in executive functions could be substantially evaded if, as the FEC maintains, Congress is constitutionally free to place its agents in agencies performing executive functions.[11] *See Bowsher*, 478 U.S. at 726

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[11] While the principal purpose of the Incompatibility Clause appears to have been to prevent a repetition of the corruption occurring in 18th-century British government, its importance to the doctrine of separation of powers was understood by the Founders. In responding to the James Madison's suggestion that the clause should exclude legislators only from offices established during their service in Congress (thus allowing members to serve concurrently in all other offices), Elbridge Gerry remarked:

> It appears to me that we have constantly endeavored to keep distinct the three great branches of government; but if we agree to this motion, it must be destroyed by admitting the legislators to share in the executive, or to be too much influenced by the executive, in looking up to him for offices.

1 The Records of the Federal Convention of 1787, 393 (M. Farrand ed., rev. ed. 1987) (June 23, 1787).

("The structure of the Constitution does not permit Congress to execute the laws; it follows that Congress cannot grant to an officer under its control what it does not possess.").

Finally, we agree with the Solicitor General's point that participation of congressional agents in executive deliberations regarding law enforcement issues is in tension with the Founder's determination, as reflected in the Bill of Attainder Clause, U.S. Const. Art. I, § 9, cl. 3, to separate the legislative power to make generally applicable laws from the executive power to apply those laws to specific factual circumstances. *See* U.S. Br. at 21-22.

For the foregoing reasons, the court of appeals correctly concluded that the statutory designation of the Secretary and the Clerk as *ex officio* nonvoting members of the Commission impermissibly encroaches on the domain of the Executive. Accordingly, the Commission lacks constitutional authority to prosecute this enforcement action.

III. Because the Commission Lacked Constitutional Authority To Bring This Enforcement Action, the Action Must Be Dismissed.

The Commission's fall-back position is that the outcome of this case is not controlled by the merits of respondents' constitutional challenge to its composition – in other words, the Commission wins no matter how this Court decides the separation of powers issue. Even if "the Commission lacks authority to bring this enforcement action," as the Court of Appeals held, Pet. App. 2a, this Court, says the FEC, should nonetheless declare the enforcement action valid and affirm the judgment of the district court assessing a $40,000 civil penalty against respondents. The Commission is joined in this argument by the Solicitor General, who urges the Court to "accord de facto validity to the Commission's prior actions" in

this case, despite their acknowledged unconstitutionality. U.S. Br. at 28.

In support of this startling proposition, both the Commission and the Solicitor General (collectively referred to as the "government") rely on two distinct, though related, lines of cases – the so-called "de facto officer" cases and cases relating to the principle of "purely prospective" application of this Court's "new" constitutional rulings. In the same vein, the FEC argues that a validly reconstituted FEC will be free simply to ratify its unconstitutional predecessor's decisions and continue to prosecute this enforcement action. As we demonstrate below, however, there is no precedent supporting the Government's claim that respondents are entitled to no relief whatsoever for their proven constitutional injury.[12] We turn first to the issue of retroactivity.

A. A Ruling By This Court That the FEC Is Unconstitutionally Composed Must Be Applied to the Parties in This Case.

1. This Court's jurisprudence concerning the retroactive application of decisions announcing "new" constitutional rulings has undergone a sweeping overhaul in recent years. The Court's experiment with "prospective" decisionmaking began almost 30 years ago, in *Linkletter v. Walker*, 381 U.S. 618 (1965), which held that the case extending the Fourth Amendment exclusionary rule to state criminal prosecutions, *Mapp v. Ohio*, 367 U.S. 643 (1961), would not be applied retroactively to a state conviction that had become final before *Mapp* was decided. The following year, the Court extended its nonretroactivity analysis to convictions pending on direct appellate review, *see Johnson v. New Jersey*, 384 U.S. 719 (1966), and shortly thereafter extended it to the civil law arena. *See Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971).

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[12] See note 24, infra.

Now, as we discuss below, the Court has come almost full circle, holding in a series of recent cases that nonretroactive adjudication is rarely consistent with "the nature of judicial review." Throughout the Court's sojourn into the field of prospective decisionmaking, however, one principle has remained constant and unquestioned: In a case brought by a government agency to enforce federal penalties for a violation of federal law, any new constitutional ruling announced in the case must be applied to the defendant before the Court. No decision of this Court has ever deviated from this principle; indeed, no Member of this Court has ever questioned it.[13] And it is directly at odds with the government's request in this case that the Court deny respondents any remedial benefit of a favorable ruling on their separation of powers challenge to the Commission's *ex officio* members. A survey of this Court's recent retroactivity cases makes this clear.

2. The Court's rethinking of prospective decisionmaking began in the criminal law area. The issue in *Griffith v. Kentucky*, 479 U.S. 314 (1987), was whether the rule announced in *Batson v. Kentucky*, 476 U.S. 79 (1986), concerning racial discrimination in the prosecution's use of peremptory challenges should be applied retroactively to convictions pending on direct review when *Batson* was decided. A majority of the Court overruled *Linkletter*, holding that any new constitutional ruling for the conduct of criminal prosecutions, such as *Batson*, must be applied retroactively to all cases pending on direct review when the new ruling was announced.

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[13] *See Illinois v. Krull*, 480 U.S. 340, 368 (1987) ("While the extent to which our decisions ought to be applied retroactively has been the subject of much debate among Members of the Court for many years, there has never been any doubt that our decisions are applied to the parties in the case before the Court.") (O'Connor J., dissenting) (citations omitted).

In so holding, the Court adopted Justice Harlan's view that prospective decisionmaking violates two "basic norms of constitutional adjudication." *Griffith*, 479 U.S. at 322. First, retroactive decisionmaking is the defining feature of the judicial function; prospective lawmaking is the role of the legislature. The "nature of judicial review" under Article III of the Constitution is to adjudicate specific "cases" and "controversies," and "the integrity of judicial review" requires that the court's decision be applied "to all similar cases pending on direct review." *Id.* at 322-323. Second, nonretroactive application of new constitutional rulings "violates the principle of treating similarly situated defendants the same." *Id.* at 323. The unequal treatment arises from the Article III requirement that a new constitutional rule be applied to the litigants before the court in the case announcing the new rule. As the *Griffith* Court noted, "it hardly comports with the ideal of 'administration of justice with an even hand,' when one 'chance beneficiary – the lucky individual whose case was chosen as the occasion for announcing the new principle – enjoys retroactive application, while others similarly situated have their claims adjudicated under the old doctrine.'" *Id.* at 327, quoting *Hankerson v. North Carolina*, 432 U.S. 233, 247 (1977) (Powell, J., concurring in the judgment).

The Court continued its rethinking of retroactivity in *Teague v. Lane*, 489 U.S. 288 (1989). In that case, a habeas corpus petitioner sought a new constitutional rule extending to the petit jury the Sixth Amendment requirement that the jury venire be drawn from a fair cross-section of the community. The Court declined, however, to address the petitioner's contention, establishing the principle that the Court will not consider new constitutional rules of criminal procedure in habeas corpus proceedings except in certain very narrow circumstances.

The reasoning of the plurality opinion in *Teague* bears directly on the correct disposition of this case and, thus, warrants extended discussion.

The *Teague* plurality opened its analysis by adopting Justice Harlan's view that new constitutional rules of criminal procedure should not be applied retroactively to cases on collateral review unless the new rule (1) immunizes the defendant's conduct from criminal proscription or (2) requires compliance with a procedure that is "implicit in the concept of ordered liberty." *Id.* at 307. In contrast to direct appellate review of criminal convictions, the need for finality in the criminal justice process weighs heavily against applying new constitutional rules retroactively in collateral proceedings. Applying Justice Harlan's retroactivity standard to the habeas petitioner's claimed Sixth Amendment right, the *Teague* plurality concluded that the proposed new constitutional rule did not satisfy either exception to the general rule of nonretroactivity for cases on collateral review. And, because the proposed rule, if established by the Court, would not be applicable to other similarly situated habeas petitioners, the Court declined even to address the merits of the petitioner's constitutional claim. The plurality reasoned as follows:

> Were we to recognize the new rule urged by petitioner in this case, we would *have to* give petitioner the benefit of that new rule even though it would not be applied retroactively to others similarly situated. . . . [S]uch an inequitable result would be "an unavoidable consequence of the necessity that constitutional adjudications not stand as mere dictum." *Stovall v. Denno*, 388 U.S. [293, 301 (1967)].

489 U.S. at 315 (emphasis added). To avoid both "the inequity resulting from the uneven application of new rules to similarly situated defendants," and the problems

of "rendering advisory opinions," the plurality adopted "the principle that habeas corpus cannot be used as a vehicle to create new constitutional rules of criminal procedure unless those rules would be applied retroactively to *all* defendants on collateral review . . . . " *Id.* at 316 (emphasis in original).

The Court's decision in *Teague* thus yields two points of controlling significance to the instant case. First, the plurality recognized that federal courts have no discretion simply to withhold the benefit of a new constitutional ruling from the litigants before the court in the case announcing the new rule. Extending appropriate relief to the parties before the court in such a case is the "unavoidable consequence" of the "command of Article III of the Constitution that [federal courts] resolve issues solely in concrete cases or controversies . . . ." *Stovall*, 388 U.S. at 301. Indeed, this fundamental tenet of Article III is what gave rise to the dilemma faced by the court in *Teague*. Because any new Sixth Amendment rule recognized by the Court would *have to* be applied to the petitioner's case, but would not qualify for retroactive application to other similarly situated habeas petitioners, the Court was faced with a choice: either it could decide the petitioner's Sixth Amendment claim and tolerate any disparate treatment among similarly situated habeas petitioners that acceptance of the claim would yield, or it could abstain from considering the merits of the petitioner's claim.

The second point of critical significance to the instant case is that the course followed by the *Teague* plurality – to abstain from considering the merits of the habeas petitioner's constitutional claim – is simply not available in a case, like this one, pending on direct appellate review. The writ of habeas corpus is discretionary. *See, e.g., Stone v. Powell*, 428 U.S. 465, 478 n.11 (1976). The exercise of appellate jurisdiction, however, is not. Federal

courts are not free to abstain from considering substantial and properly presented constitutional claims on direct review. To do so would constitute an abdication of the judicial function.[14]

3. Because the Court's retroactivity rulings in the criminal law area rested on considerations inherent in "the nature of judicial review," and on the fundamental principle of the equal judicial treatment of similarly situated litigants, it was inevitable that the Court would extend those rulings to civil cases as well. "*Griffith* cannot be confined to the criminal law." *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 540 (1991) (opinion of Souter, J., joined by Stevens, J.).

At issue in *Beam* was whether an earlier decision invalidating a discriminatory state liquor tax should be applied retroactively to a virtually identical claim arising on facts antedating the earlier decision. In announcing the decision of the Court in *Beam*, Justice Souter identified two forms of prospective decisionmaking: "pure prospectivity," in which the court declines to apply a new rule of law even to the parties in the very case in which the new rule is announced, and "selective prospectivity,"

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[14] *See, e.g., England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411, 415 (1964) ("'When a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction . . . . '") (quoting *Willcox v. Consolidated Gas Co.*, 212 U.S. 19, 40 (1908)); *Chicot County v. Sherwood*, 148 U.S. 529, 534 (1893) ("[T]he courts of the United States are bound to proceed to judgment and to afford redress to suitors before them in every case to which their jurisdiction extends. They cannot abdicate their authority or duty in any case in favor of another jurisdiction."); *Cohens v. Virginia*, 19 U.S. (6 Wheat) 264, 404 (1821) ("We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.")

in which the court applies a newly announced rule to the parties before it, but then returns to the old rule with respect to all other cases arising on facts predating the new rule. The *Beam* Court, relying on the reasoning of *Griffith*, outlawed selective prospectivity in civil cases, holding that "when the Court has applied a rule of law to the litigants in one case it must do so with respect to all others not barred by procedural requirements or res judicata." 501 U.S. at 544.

More relevant to the instant case, however, were Justice Souter's comments concerning pure prospectivity. With respect to criminal cases, Justice Souter noted that purely prospective adjudication is wholly unknown and unavailable: "[R]etroactive application could hardly [be] denied the litigant in the law changing decision itself. A criminal defendant usually seeks one thing only on appeal, the reversal of his conviction; future application would provide little in the way of solace." *Id.* at 537. With respect to civil cases, Justice Souter questioned whether "pure prospectivity may be had at all," *id.* at 541, but refused to "speculate as to the bounds or propriety of pure prospectivity." *Id.* at 544.

While none of the opinions in *Beam* garnered the support of a majority of the Court, any doubt about the decision's precedential status was eliminated in *Harper v. Virginia Dept. of Taxation*, 113 S. Ct. 2510 (1993). Relying heavily both on *Griffith* and on Justice Souter's opinion in *Beam*, a majority of the Court held that

> [w]hen this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate . . . announcement of the rule.

Id. at 2517. The Court made clear that its ruling, like that in *Griffith*, was dictated by "basic norms of constitutional adjudication." *Id.* at 2516, quoting *Griffith v. Kentucky*, 479 U.S. at 322. As the Court noted: "Our approach to retroactivity heeds the admonition that '[t]he Court has no more constitutional authority in civil cases than in criminal cases to disregard current law or to treat similarly situated litigants differently.' " *Id.* at 2517-18, quoting *American Trucking Ass'ns Inc. v. Smith*, 496 U.S. 167, 214 (1990) (Stevens, J., dissenting). Seizing upon this statement and similar ones in the majority opinion, the dissenters in *Harper* read the opinion as "intimat[ing] that pure prospectivity may be prohibited as well." 113 S. Ct. at 2527 (O'Connor, J., joined by Rehnquist, C.J., dissenting).

4. As the foregoing survey of this Court's recent retroactivity rulings reflects, a candid reading of the Court's decisions appears to foreclose purely prospective decisionmaking. If "the nature of judicial review" under Article III of the Constitution requires that all newly declared constitutional rules be applied to all cases, whether criminal (*Griffith*) or civil (*Harper*), still open on direct review, then it follows *a fortiori* that the new constitutional rule must be applied in the very case in which it is announced. Similarly, if the courts are not free "to disregard current law," then a court is bound to resolve each claim properly before it in accord with its best understanding of the rules of law governing the claim. Indeed, if the phrase "due process of law" means anything, surely it must mean that a litigant in a federal court is entitled to have his claim resolved in accordance with the law – the *right* law. Justice Harlan put the point well: "[O]nce the decision to abandon precedent is made, I see no justification for applying principles determined to be wrong, be they constitutional or otherwise, to litigants who are in or may still come to court." *United States v.*

Estate of Donnelly, 397 U.S. 286, 295-297 (1970) (concurring opinion).

But even if there is some circumstance in which a purely prospective decision would be consistent with "basic norms of constitutional adjudication," it is not this case. Here, a government law enforcement agency seeks the judicial imposition of a civil penalty for an alleged violation of a federal regulatory statute. As previously discussed, in the criminal law area, the Court has long recognized, without dissent, that application of a new constitutional rule to the parties in the case announcing it is an "unavoidable consequence" of Article III's prohibition against rendering advisory opinions. Indeed, even the dissenting Members of the Court in *Harper* acknowledged that purely prospective decisionmaking is inappropriate in a criminal case. In contrast to civil litigants, who may receive some benefit from purely prospective relief, "[t]he criminal defendant . . . is usually interested only in one remedy – reversal of his conviction. *That* remedy can be obtained only if the rule is applied retroactively." *Harper*, 113 S. Ct. at 2531 (O'Connor, J., joined by Rehnquist, C. J., dissenting) (emphasis in original); *see American Trucking*, 496 U.S. at 199 (1990) ("The prospective invalidation of a rule relied on in securing his conviction will not assist the criminal defendant in any way.").[15]

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[15] In arguing against the extension of *Griffith's* retroactivity principles to civil cases, the dissenters in *Harper* distinguished the civil and criminal contexts on two additional grounds. *See Harper*, 113 S. Ct. at 2530-31 (O'Connor, J., joined by Rehnquist, C. J., dissenting). First, they argued that "the generalized policy of favoring individual rights over governmental prerogative can justify the elimination of prospectivity in the criminal arena." *Id.* at 2530. Second, the dissenters argued that, while "there is little difference between the criminal defendant in whose case a decision is announced and the defendant who

Pure prospectivity for new constitutional rules in the criminal area would thus deaden "the incentive of counsel to advance contentions requiring a change in the law. . . . " *Stovall*, 388 U.S. at 301. These considerations apply with equal force to a defendant in a civil enforcement action seeking the imposition of civil penalties for an alleged violation of a federal regulatory statute.

5. The Solicitor General argues that "[u]nless and until the Court's prior decisions employing pure prospectivity are overruled, established law makes clear that this course of action is permissible in appropriate situations." U.S. Br. at 28. He cites four cases in which this Court allegedly rendered a purely prospective judgment by declining to apply the newly announced rule of law to the parties before it: *Buckley v. Valeo*, 424 U.S. 1 (1976); *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982); *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971); and *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411 (1964). Of the cases cited, only one – *England* – is truly an example of pure prospectivity. Indeed, *England* is the only case that we have been able to find in which the

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seeks certiorari on the same question two days later," the litigants in follow-on civil cases may not be similarly situated to the litigants in the case in which the new rule of civil law was announced. *Id.* at 2531. In this regard, the dissent noted that the party in *Harper* seeking retroactive application of an earlier decision had not "litigated and preserved the retroactivity question." Neither of these points, however, serves to distinguish in any way a criminal prosecution from a civil enforcement action by governmental authorities. Indeed, the Solicitor General himself acknowledges that "the present case involves a challenge to the Commission's *prosecutorial* rather than adjudicative functions." U.S. Br. at 26 (emphasis added). We also note that unlike the litigant in *Harper*, respondents here raised their constitutional defenses to the Commission's enforcement action in their answer to the Commission's complaint. *See* J.A. 16-17.

rule adopted in a law-changing case was not applied to the parties before the Court. The government, however, relies most heavily on *Buckley* and *Northern Pipeline*, so we turn first to those cases.

In *Buckley*, this Court accorded "*de facto* validity" to the past acts of the Commission. But *Buckley* was not an enforcement action brought by a federal regulatory agency. Rather, it was an action brought against the Commission solely for declaratory and injunctive relief. The case therefore had, and could only have had, "purely prospective impact," Pet. App. 17a, in that the FEC had taken no action against the plaintiffs at the time the suit was filed. It cannot be argued that the plaintiffs in *Buckley*, although they prevailed, were granted no remedy; they got precisely the remedy they sought.

Nor did the Court's validation of the Commission's past acts deprive any other litigant of a constitutional defense to a pending enforcement action. The *Buckley* case was brought immediately upon passage of the FECA, and, as this Court acknowledged, no judicial enforcement action had been initiated by the Commission at the time of this Court's decision. *See Buckley*, 424 U.S. at 114-118 & n.157.[16] Indeed, the Commission had not even exercised its rulemaking power under the statute until after the Court of Appeals' decision had been rendered. *Id.* at 115-116. In short, nothing in this Court's decision in *Buckley* suggests that had the case arisen in the context of a defense to an enforcement action, this Court would have validated the FEC's actions, including

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[16] If there had been other parties involved in litigation or enforcement matters against the Commission when *Buckley* was decided to whom the Court's holding did not retroactively apply, *Buckley* would have been another example of "selective prospectivity," a practice that the Court has definitively rejected. *Harper*, 113 S. Ct. at 2517.

any award of civil penalties, notwithstanding the Court's determination that the Commission itself was constitutionally invalid and thus without authority to initiate the action.

Nor is *Northern Pipeline* an example of pure prospectivity. In that case, the Court held that the new rule it had announced – that a federal bankruptcy court lacks constitutional authority to adjudicate contract claims arising under state law – "shall apply only prospectively." 458 U.S. at 88. Nonetheless, it is clear, as the court of appeals below concluded, that "the party who challenged the constitutionality of the statute was afforded relief." Pet. App. 18a. Not only did the Court affirm the district court's judgment dismissing the case, it expressly stated that "at the least, the new bankruptcy judges cannot constitutionally be vested with jurisdiction to decide *this* state-law contract claim against Marathon." 458 U.S. at 87 n.40 (emphasis added).

The issue in *Chevron Oil* was whether the time for bringing the action was governed by a state statute of limitations, in which case the action was time-barred, or by the admiralty law doctrine of laches, in which case it was not. While the case was pending before the district court, the Supreme Court held in *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352 (1969), that state law rather than admiralty law applies in such cases. The issue before the Supreme Court in *Chevron Oil* was thus whether "*Rodrigue* should . . . be applied retroactively to bar actions filed before the date of its announcement." 404 U.S. at 99. The Court held that state statutes of limitations made applicable under *Rodrigue* "should not be applied retroactively." 404 U.S. at 108 n.10.

Chevron Oil is thus distinguishable from this case on several grounds. First, and most importantly, it was not the law-changing case; *Rodrigue* was. And the rule of law

announced in *Rodrigue* was applied to the litigants before the court in that case. *See Rodrigue*, 395 U.S. at 366. Thus, *Chevron Oil* was not an example of purely prospective decisionmaking. Rather, it was a straight-forward example of selective prospectivity, which this Court expressly overruled in *Harper*. Second, the rule applied in *Chevron Oil* was not a constitutional norm. The case involved, instead, "the application of a statute of limitations, an area over which the federal courts historically have asserted equitable discretion to craft rules of tolling, laches, and waiver." *American Trucking*, 496 U.S. at 221 (Stevens, J., dissenting). Finally, the case did not involve the applicability of a constitutional defense to a government enforcement action.

The *England* case is an example of pure prospectivity, but it too is readily distinguishable from this case. The plaintiffs in *England* challenged the constitutionality of certain state law requirements governing the practice of medicine. The federal district court, however, abstained from deciding the federal constitutional issue until certain potentially dispositive state law issues could be resolved in state court. The plaintiff litigated in state court not only the state law question, but his federal constitutional claim as well, under the reasonable belief that earlier Supreme Court precedent required him to do so. The *England* Court held that a federal litigant is entitled to return to the abstaining federal district court for resolution of his federal claims "unless it clearly appears that he voluntarily . . . and fully litigated his federal claims in the state courts." 375 U.S. at 421. Although the Court concluded that "[o]n the record in the instant case, the rule we announce today would" foreclose reconsideration of plaintiff's federal claims in federal court, the Court was "unwilling to apply the rule against these appellants" since they had litigated their federal claims in

the state court upon the reasonable, though mistaken, view that they were required to do so. *Id.* at 422.

Thus, the rule that the Court announced in *England* but declined to apply to the parties before it did not enforce a constitutional norm, but rather concerned an issue – abstention – over which the Court had equitable discretion. Nor did the case arise in a context involving federal agency enforcement of criminal or civil penalties for an alleged violation of federal law.[17]

6. The parties in this case would not be debating, we submit, the applicability to respondents of a favorable constitutional ruling if respondents were seeking relief

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[17] The dissent in *Harper* cites two additional cases – *City of Phoenix v. Kolodziejski*, 399 U.S. 204 (1970), and *Cipriano v. City of Houma*, 395 U.S. 701 (1969) – in which this Court is said to have "announced rules of purely prospective effect." *Harper*, 113 S. Ct. at 2528 (O'Connor, J., joined by Rehnquist, C. J., dissenting); *see also Beam*, 501 U.S. at 545 (White, J., concurring in the judgment) (citing *Cipriano* as case in which a new rule was not applied retroactively, "even to the parties before the Court"). In both cases, the Court invalidated, on malapportionment grounds, state laws restricting the electorate for elections authorizing the issuance of municipal bonds. In both cases, the Court crafted a rule of partial retroactivity, applying its rulings only to prior elections that had been timely challenged under state law or had otherwise not become final as of the date of the decision. *See Cipriano*, 395 U.S. at 706 (ruling applies "only where, under state law, the time for challenging the election result has not expired, or in cases brought within the time specified by state law for challenging the election and which are not yet final"); *Phoenix*, 399 U.S. at 214 ("[O]ur decision in this case will apply only to authorizations for general obligation bonds that are not final as of . . . the date of this decision."). In both cases, the bond authorization election giving rise to the Court's ruling was invalidated pursuant to the Court's ruling. In other words, in both cases the ruling was applied to the parties before the Court. Accordingly, neither case is an example of purely prospective adjudication.

for a violation of the First Amendment. Presumably even the government would not maintain that a decision by this Court that the Commission's enforcement action against respondents violated the First Amendment should be applied purely prospectively so as to allow the government to assess and collect a $40,000 fine for the exercise of constitutionally protected activity. The constitutional separation of powers, however, was designed by the Founders to provide "the foundation of a structure of government that would protect liberty." *Bowsher v. Synar*, 478 U.S. 714, 722 (1986). And there is no basis in logic or law for creating a special "prospectivity" rule for decisions upholding the Constitution's structural limitations.

Indeed, this Court's separation of powers decisions refute the government's remarkable suggestion that the Court may, in successive breaths, declare both that the Constitution prohibits a federal official or body from exercising certain governmental authority, and that the government's exercise of such authority will nonetheless be deemed valid in this case. In *every one* of this Court's decisions upholding a separation of powers challenge to the constitutional validity of a federal officer's or body's authority, the Court has granted full relief to the plaintiff. For example, in *INS v. Chadha*, 462 U.S. 919 (1983), a deportation order against the plaintiff was canceled as a result of his successful challenge under Article I to a provision of the federal immigration law authorizing either House of Congress to invalidate the Attorney General's order suspending deportation. Even though one-house veto provisions had been incorporated into scores of statutes and their constitutional invalidity had not been foreshadowed in prior cases, there is no hint in *Chadha* that the one-house veto provision struck down there could simply be deemed valid, or applied purely prospectively, and Mr. Chadha sent on his way. *See also*

MWAA, 501 U.S. 252 (statutorily created Board of Review violated separation of powers and challenged act of Board, accordingly, invalid).

7. The availability of a remedy redressing a litigant's alleged injury is the premise of the well-established rule that "[p]arty litigants with sufficient concrete interests at stake may have standing to raise constitutional questions of separation of powers with respect to an agency designated to adjudicate their rights." *Buckley*, 424 U.S. at 117. If, as the government contends, respondents in this case are not entitled to any meaningful relief even if their constitutional claim has merit, it follows that they are not entitled to assert their constitutional defense and that this Court is not entitled to reach and adjudicate its merits. This Court's cases resolving the merits of separation of powers challenges to government actions implicitly refute the government's claim that this Court is free both to adjudicate the merits of respondents' constitutional claim and to deny respondents the benefit of a favorable ruling.

In sum, the court of appeals below correctly concluded that in this enforcement action there is "no theory that would permit [a court] to declare the Commission's structure unconstitutional without providing relief to the [respondents] in this case." Pet. App. 18a.

B. The De Facto Officer Doctrine Is Not Applicable to This Case.

The Commission and the Solicitor General also invoke the *de facto* officer doctrine in support of their contention that the Court should withhold from respondents any benefit of a favorable constitutional ruling. *See* FEC Br. at 26-32; U.S. Br. at 23-29. Under that doctrine,

"where there is an office to be filled and one, acting under color of authority, fills the office and discharges its duties, his actions are those of an officer *de facto*, and binding upon the public." *Glidden Co. v. Zdanok*, 370 U.S. 530, 535 (1962) (plurality opinion of Harlan, J.) (quoting *McDowell v. United States*, 159 U.S. 596, 602 (1895)). Because respondents challenge the FEC's constitutional authority to bring this enforcement action, the *de facto* officer doctrine has no application to this case.

1. It is well settled that in order for a putative governmental official to be considered a *de facto* officer, he must, at a minimum, occupy a *de jure* office – that is, a valid office created pursuant to a constitutional act.[18] This proposition was central to this Court's holding in the leading case of *Norton v. Shelby County*, 118 U.S. 425 (1886). There, in the course of declining to apply the *de facto* officer doctrine, the Court stated that "the idea of an officer implies the existence of an office which he holds. It would be a misapplication of terms to call one an 'officer' who holds no office, and a public office can exist only by force of law." *Id.* at 442. And in response to the plaintiff's argument that "a legislative act, though unconstitutional, may in terms create an office, and nothing further than its apparent existence is necessary to give validity to the acts of its assumed incumbents," *id.*, the

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[18] *See* Albert Constantineau, *A Treatise on the De Facto Doctrine* § 28 at 41 (1910) ("[T]he existence of a de jure office is a condition precedent to the existence of an officer de facto, and that without such an office the pretended officer can never be afforded any legal recognition."); *id.* § 34 at 51 ("A further corollary of the general rule is, that an unconstitutional Act, being no law, is incapable of creating a de jure office, and therefore the incumbent of an office thus created is not an officer de facto."); Note, *The De Facto Officer Doctrine: The Case for Continued Application*, 85 Colum. L. Rev. 1121, 1122-23 (1985).

Court stated: "An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; *it creates no office*; it is, in legal contemplation, as inoperative as though it had never been passed." *Id.* (emphasis added); *see also United States v. Royer*, 268 U.S. 394, 397 (1925) ("Of course, there can be no incumbent de facto of an office if there be no office to fill.") (citing *Norton*); *McDowell*, 159 U.S. at 601 (same).[19] The doctrine thus distinguishes between actions taken by individuals occupying an invalid "office" that was created by an unconstitutional act, and those taken by an individual who was unlawfully elected or appointed to a valid, or *de jure*, office; the official actions of the latter, but never of the former, may be accorded *de facto* validity.[20]

It follows, therefore, that if the Court concludes that the FEC is unconstitutional – in other words, if it agrees with respondents and the court of appeals that the *ex officio* members of the Commission constitutionally disqualify it from performing a purely executive function –

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[19] *See also* Clifford L. Pannam, *Unconstitutional Statutes and De Facto Officers*, 2 Fed. L. Rev. 37, 51 (1966) ("*Norton v. Shelby County* thus states a very serious limitation on the operation of the *de facto* doctrine. It operates to deny the status of a *de facto* officer to any person who purports to fill an office which has been created by an unconstitutional statute.").

[20] *See Norton*, 118 U.S. at 444 (noting that certain cases cited by counsel in support of applying the doctrine "apply only to the invalidity, irregularity, or unconstitutionality of the mode by which the party was appointed or elected to a legally existing office. None of them sanctions the doctrine that there can be a *de facto* office under a constitutional government . . . . "); *see also Ryan v. Tinsley*, 316 F.2d 430, 432 (10th Cir.), *appeal dismissed* and *cert. denied*, 375 U.S. 17 (1963) (recognizing distinction and citing *Norton*); Pannam, 2 Fed. L. Rev. at 48-50 (same).

then the FEC's prior actions in connection with this enforcement action cannot be validated under the *de facto* officer doctrine. Wholly ignoring this prerequisite to the application of that doctrine, the FEC and the United States argue, in effect, that the equities of this case warrant its application. But while it is true that the doctrine "is founded upon considerations of policy and necessity, for the protection of the public and individuals whose interests may be affected thereby," *Norton*, 118 U.S. at 441, *Norton* itself makes clear that these equitable considerations must give way when the application of the doctrine would permit the government to evade constitutional constraints.[21] The answer to the FEC's complaint that it will work a great hardship to require the Commission to revisit its prior (unauthorized) actions is,

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[21] While respondents do not agree that the equities here weigh in favor of applying the doctrine, the Court need not address that question. In *Norton*, for example, the Court's refusal to apply the *de facto* officer doctrine permitted Shelby County to avoid any obligation in connection with bonds that, while not authorized by a constitutional body, nonetheless benefitted the County's treasury. Weighing this seemingly harsh result against the rule of law adopted by the Court in that case, Judge Constantineau concluded as follows:

> [I]f a legislative body, whose powers are limited by a written instrument, be permitted to create offices in violation of such instrument, and the courts are to condone such wrongdoing by holding the incumbents thereof officers de facto, it is easily seen that the paramount rights of the people are unduly sacrificed to avoid occasional evils to a few individuals or to a small portion of the community. To sanction such usurpation of power, is to allow the legislature to ignore and override the sovereign will and authority of their masters.

Constantineau, § 40 at 60-61. This reasoning applies with equal force in this case.

then, that the constitutional separation of powers is a weightier consideration than administrative convenience.

2. Quite apart from the absence of a *de jure* office, the *de facto* officer doctrine is inapplicable for another reason: respondents' substantive challenge to the FEC's authority to prosecute this enforcement action is "based upon nonfrivolous constitutional grounds." *Glidden*, 370 U.S. at 536. As the Solicitor General acknowledges, the *de facto* officer doctrine is a doctrine of preclusion, preventing a party from raising, and a court from adjudicating, a collateral attack on a putative officer's actions based on the alleged unlawfulness of the putative officer's election or appointment. U.S. Br. at 25 (citing *Ball v. United States*, 140 U.S. 118, 129 (1891); *McDowell*, 159 U.S. at 601-02; *Ryan*, 316 F.2d at 432). It operates, however, only where the substantive ground for the challenge is some technical legal defect in the incumbent's "title" to the office.[22]

Glidden illustrates this point clearly. There, the Solicitor General argued that the petitioners, having failed to raise below their Article III objection to the judges who decided their cases, ought to be precluded by the *de facto* officer doctrine from raising that claim for the first time on appeal. Justice Harlan noted first that the doctrine did not apply "when the statute claimed to restrict authority is not merely technical but embodies a strong policy concerning the proper administration of judicial business," 370 U.S. at 535-36, and held that "[*a*] *fortiori* is this

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[22] *Compare Norton*, 118 U.S. at 441-449 (doctrine not applied where "office" was unconstitutionally created) *with Ball*, 140 U.S. at 119 (doctrine applied where designation of sitting judge to fill vacancy in another district may have been in violation of statute), and *McDowell*, 159 U.S. at 601-02 (same).

so when the challenge is based upon nonfrivolous constitutional grounds." *Id.* at 536.[23]

The rule stated expressly in *Glidden* – that the *de facto* officer doctrine will not operate to pre[redacted] a court from addressing the merits of a substantial constitutional claim – is implicit in all of the separation of powers cases decided on the merits by this Court. We have noted earlier that in *Chadha*, *MWAA*, and other separation of powers cases similar to this one, the Court decided the merits of the constitutional issue and applied to the parties before the Court the newly announced rule of law; the Court obviously did not invoke the *de facto* officer doctrine to preclude consideration of the constitutional challenges. *See also, e.g., Mistretta v. United States*, 488 U.S. 361 (1989) (reaching merits but rejecting challenge); *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986) (same).

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[23] This same principle was applied by the court of appeals below in rejecting the doctrine: "[T]he court should avoid an interpretation of the de facto officer doctrine that would likely make it impossible for these plaintiffs to bring their assumedly substantial constitutional claim and would render legal norms concerning appointment and eligibility to hold office unenforceable." Pet. App. 17a, n.6 (quoting *Andrade v. Lauer*, 729 F.2d 1475, 1498 (D.C. Cir. 1984)). The commentators agree. *See* Constantineau, § 40 at 60-61; Pannam, 2 Fed. L. Rev. at 61-62 ("[T]here may be constitutional policies and provisions which are deemed to be so important that their thrust should not be curbed by the application of the *de facto* doctrine. In other words there may be situations in which public inconvenience and the frustration of legitimate reliance must give way to the retroactive invalidation of official acts in order to vindicate a constitutional boundary, or to guarantee a constitutional right."); Note, 85 Colum. L. Rev. at 1126 ("The Supreme Court itself has held that the doctrine does not apply where there is a 'nonfrivolous constitutional' challenge to an exercise of authority.") (quoting *Glidden*).

Respondents' separation of powers claim, like the Article III challenge in *Glidden*, "relates to basic constitutional protections designed in part for the benefit of litigants." *Glidden*, 370 U.S. at 536. The *de facto* officer doctrine does not apply to this case.

C. A Newly Constituted FEC May Not Ratify the Unauthorized Acts of Its Unconstitutional Predecessor.

The FEC's contends that this Court should remand this case to the court of appeals to permit the "reconstituted Commission . . . to decide whether to proceed with this civil law enforcement action against them." FEC. Br. at 30; *see also id.* at 13, 26, 30-32 and n.20.[24] If, as the FEC contends, the reconstituted Commission can simply vote to ratify its past actions and "to continue pursuing this case," *id.* at 32, then the Commission's unconstitutionality is, legally and practically, immaterial. The principle of ratification does not support that result.

Ratification, which is a principle of the law of agency, permits a principal to validate an agent's prior action even though the agent was not unauthorized to perform the act at the time.[25] It is clear that a constitutionally

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[24] The FEC asserts that such a remand would accord respondents "full relief on their constitutional claim." FEC Br. at 30. The FEC is free at any time to discontinue this enforcement action, if that is its will. Requiring it to formally "decide whether to proceed" with an enforcement action on which it is proceeding aggressively is, obviously, a meaningless gesture. Far from "full relief," the remand suggested by the Commission is no relief whatsoever.

[25] *See* Restatement (Second) of Agency § 82 (1957) ("Ratification is the affirmance by a person of a prior act which did not bind him but which was done or professedly done on his account, whereby the act, as to some or all persons, is given

valid FEC – that is, an FEC reconstituted to exclude the *ex officio* members – cannot ratify prior constitutionally unauthorized actions taken by the former, invalid FEC. First, there simply can be no principal-agent relationship between a reconstituted FEC and the Commission that has thus far prosecuted this enforcement action; yet such a relationship is a *sine qua non* of the principle of ratification.[26]

Second, "[a]n act which, when done, the purported or intended principal could not have authorized, he cannot ratify." Restatement (Second) of Agency § 84(2) (1957); *see also id.* cmt. c ("[A]n act is not capable of ratification unless the person acting purports or intends to act for a person who, at the time of the act, has capacity to authorize such an act. Thus, the affirmance by a person not in existence at the time of the original act

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effect as if originally authorized by him."). This Court has repeatedly endorsed the doctrine of ratification, usually in cases involving congressional ratifications of government actions that were taken by governmental entities without the requisite statutory authorization. *See, e.g., Swayne & Hoyt v. United States*, 300 U.S. 297, 301-02 (1937) ("It is well settled that Congress may, by enactment not otherwise inappropriate, ratify . . . acts which it might have authorized, and give the force of law to official action unauthorized when taken.") (internal quotations and citations omitted); *United States v. Heinszen*, 206 U.S. 370, 384 (1907) (same).

[26] *See, e.g., Franklin Sav. Ass'n v. Office of Thrift Supervision*, 740 F. Supp. 1535, 1539 (D.Kan. 1990), *rev'd on other grounds*, 934 F.2d 1127 (10th Cir. 1991), *cert. denied*, 112 S. Ct. 1475 (1992) (holding, in case where constitutionally valid officer attempted to ratify actions of constitutionally invalid predecessor, that "Director Ryan is not and never was Director Wall's principal, and thus, cannot ratify Director Wall's act"); *see also Heinszen*, 206 U.S. at 382.

does not result in ratification.").[27] Because the "new" FEC plainly did not exist at the time this enforcement action was commenced, an attempt to ratify that unauthorized action cannot be effective.

Finally, any attempted ratification must fail because the "old" FEC was an unconstitutional entity, and as such it could not have been authorized to prosecute this enforcement action. *See, e.g., Norton,* 118 U.S. at 451 (rejecting claim that bonds issued by unconstitutional body could be ratified by lawful entity; "[i]t could not ratify the acts of an unauthorized body."). This unauthorized enforcement action cannot be salvaged through ratification.

* * *

The short of the matter is that the Court is not free "to declare the Commission's structure unconstitutional without providing relief to [respondents] in this case." Pet. App. 18a. There is simply no merit in the government's desperate arguments that, notwithstanding the FEC's unconstitutionality, its prosecution of this enforcement action must nonetheless be allowed to continue based upon the *de facto* officer doctrine, or "pure prospectivity," or ratification, or some combination of these three theories. If this Court agrees that the Commission's structure is unconstitutional for purposes of prosecuting an enforcement action, it should affirm the court of appeals' judgment requiring dismissal of this action.

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[27] *See also Cook v. Tullis,* 85 U.S. (18 Wall.) 332, 338 (1874) ("[I]t is essential that the party ratifying should be able not merely to do the act ratified *at the time the act was done,* but also at the time the ratification was made.") (emphasis added); *Franklin,* 740 F. Supp. at 1539.

IV. The Absence of Presidential Removal Power Over Commissioners and the Requirement of Bipartisan Membership Render the Commission Unconstitutional

The constitutional violation found by the court of appeals does not exhaust the separation of powers defects in the structure of the FEC. As we demonstrate below, even if the Court holds that the statutory membership of congressional agents on the FEC does not violate the separation of powers, the court of appeals' decision should nonetheless be affirmed.[28]

1. We submit that the Executive has no removal authority over Commissioners, and that the FECA thus unconstitutionally impairs the President's ability to "take Care that the Laws be faithfully executed." U.S. Const. Art. II, § 3, cl. 4. The court of appeals concluded that "there is not much vitality to the [removal] claim after *Morrison v. Olson,* 487 U.S. 654 (1988)." Pet. App. 11a. The

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[28] The FEC argues that the Court should not address these two issues on the ground that respondents did not raise them in a cross-petition for certiorari, and because "none of the[m] . . . is a 'necessary predicate to the resolution of the question[s] presented in the petition' for certiorari." FEC at 32 (quoting *Caspari v. Bohlen,* 114 S. Ct. 948, 953 (1994)). The FEC is wrong. Supreme Court Rule 14.1(a) – the rule at issue in *Caspari* – governs what issues the *petitioner* may raise in support of reversal. It is well settled, however, that a *respondent* may "defend its judgment on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by the District Court or the Court of Appeals." *Washington v. Confederated Bands and Tribes of Yakima Indian Nation,* 439 U.S. 463, 476 n.20 (1979); *see also Johnson v. De Grandy,* 114 S. Ct. 2647, 2653 n.5 (1994) ("The [respondent] is entitled to 'urge any grounds which would lend support to the judgment below.' ") (quoting *Dayton Bd. of Ed. v. Brinkman,* 433 U.S. 406, 419 (1977)).

court also questioned the premise of our argument, stating that it could "safely assume that the President would at a minimum have authority to discharge a Commissioner for good cause – if for no other." Pet. App. 12a.

To begin with the latter point, the Act itself is silent on the question of removal. *See* Pet. App. 12a. While it is true that "at will" presidential removal power may inhere in a power to appoint officers, *see, e.g., Shurtleff v. United States*, 189 U.S. 311, 316 (1903), such an interpretation here would obviously conflict with the Act's structure and legislative history confirming the intent of Congress to ensure the FEC's independence from presidential control.[29]

Nor is the removal issue resolved by assuming that the Act grants the President "good cause" removal power over Commissioners. First, such an assumption would require the Court somehow to coax from the statute's *silence* on the issue not only a power to remove, but also particular limitations on that power – in essence, a removal "code." Such an interpretive project is particularly complicated here; Congress has experimented with a variety of restrictions on Presidential removal power, and it is difficult to conceive of the basis on which the

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[29] While the Senate Report described the 1976 Amendment to the FECA as "a measure designed to reconstitute the [FEC] as an independent executive branch agency," Sen. Rep. No. 94-677, 94th Cong., 2d Sess. 1 (1976), the history of the Amendments, particularly the inclusion of a sweeping one-House legislative veto, amply reflect Congress' intention to render the FEC wholly independent (save for appointment) of Executive control and beholden solely to Congress. *See, e.g.*, H.R. Rep. No. 94-917, 94th Cong., 2d Sess. 881 (1976) (minority views) ("[The amendments] strike at the very heart of an independent [FEC] and in effect reconstitute it as a virtual sub-committee of this Committee."); 122 Cong. Rec. S3686, S6364, H2535, H8864 (1976) (statements of Sens. Clark and Cannon, Reps. McHugh and Hays).

Court could choose among them.[30] The Act's legislative history is unhelpful in this regard, for it contains not a single reference to the issue of removal, thus further reinforcing the conclusion that no Presidential removal authority was contemplated.

More importantly, a limited presidential removal power over FEC Commissioners would not satisfy constitutional standards. Prior decisions of this Court upholding "good cause" limitations on the President's removal power over government appointees do not counsel otherwise. For example, the officers at issue in both *Humphrey's*

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[30] For example, among federal independent agencies that have civil enforcement authority, there are at least four others in addition to the FEC that have no statutory provision relating to removal. *See, e.g.*, Commodity Futures Trading Commission, 7 U.S.C. § 4(a); Equal Employment Opportunity Commission, 42 U.S.C. § 2000(e); Securities and Exchange Commission, 15 U.S.C. § 78(d). By contrast, the members of at least six agencies with law enforcement authority are removable by the President for "inefficiency, neglect of duty, or malfeasance in office." *See, e.g.*, Federal Trade Commission, 15 U.S.C. § 41; Interstate Commerce Commission, 49 U.S.C. § 10301(c); Nuclear Regulatory Commission, 42 U.S.C. § 5841(e); *see also*, National Labor Relations Board, 29 U.S.C. § 153(a) ("for neglect of duty or malfeasance in office"). Members of three additional agencies with substantial executive authority are removable by the President "for cause." *See* Federal Reserve System, 12 U.S.C. § 242; Postal Rate Commission, 39 U.S.C. § 3601(a); U.S. Postal Service, 39 U.S.C. § 202(a). And while some statutes purporting to create an "independent agency in the executive branch" include no removal provision, *see, e.g.*, Federal Housing Finance Board, 12 U.S.C. § 1422(a); Farm Credit Administration, 12 U.S.C. § 2242; Federal Labor Relations Authority, 5 U.S.C. § 903, other such agencies include explicit removal provisions. *See* National Archives and Records Administration, 44 U.S.C. § 2103 ("at will" removal); National Mediation Board, 45 U.S.C. § 154 ("inefficiency, neglect of duty, malfeasance in office, or ineligibility, but for no other cause").

Executor v. United States, 295 U.S. 602 (1935),[31] and *Weiner v. United States*, 357 U.S. 349 (1958), lacked the authority, which FEC Commissioners manifestly enjoy, to enforce a statute by seeking judicial imposition of a civil penalty – the power that gives rise to this instant case, and one that this Court has consistently recognized to be at the core of Executive Branch functions. *See Buckley*, 424 U.S. at 138. By contrast, this Court characterized the powers possessed by the FTC Commissioners in *Humphrey's Executor* and the members of the War Claims Commission in *Wiener* as "quasi-legislative" or "quasi-judicial."[32]

Similarly, the FECA is wholly lacking in the type of statutory protections of executive branch prerogatives that this Court in *Morrison* found essential to the validity of the "good cause" limitation on removal of an "independent counsel" appointed under the Ethics in Government Act of 1978. *Morrison v. Olson*, 487 U.S. 654 (1988). As the Court emphasized:

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[31] *Humphrey's Executor* is further distinguishable, of course, in that the FTC statute at issue in that case expressly provided for presidential removal for "inefficiency, neglect of duty, or malfeasance in office." 195 U.S. at 619. There was thus no statutory silence to interpret.

[32] In *Humphrey's Executor*, the Court stated that the FTC "cannot in any proper sense be characterized as an arm or an eye of the executive," 295 U.S. at 628, and held that "[t]o the extent it exercises any executive function, as distinguished from executive power in the constitutional sense, it does so in the discharge and effectuation of its quasi-legislative or quasi judicial powers, or as an agency of the legislative or judicial departments of the government." *Id.* The FTC did not possess civil enforcement authority. The powers of the War Claims Commission were even farther removed from the executive realm, as that body was established solely to "adjudicate according to law" three narrow classes of claims against Japan. *Wiener*, 57 U.S. at 354.

> No independent counsel may be appointed without a specific request by the Attorney General, and the Attorney General's decision not to request appointment . . . is committed to his unreviewable discretion. The Act thus gives the Executive a degree of control over the power to initiate an investigation by the independent counsel. In addition, the jurisdiction of the independent counsel is defined with reference to the facts submitted by the Attorney General, and once a counsel is appointed, the Act requires that the counsel abide by Justice Department policy unless it is not "possible" to do so . . . . [I]n our view *these features of the Act give the Executive Branch sufficient control over the independent counsel to ensure that the President is able to perform his constitutionally assigned duties.*

Id. at 696 (emphasis added). It is clear that the Executive exercises no similar control over FEC Commissioners. The *Morrison* Court also noted that the office of independent counsel was a "temporary" office, "appointed essentially to accomplish a single task." 487 U.S. at 672. In addition, the independent counsel had no "authority to formulate policy for the Government or the Executive Branch." *Id.* at 671. Again, the powers of the FEC stand in stark contrast, for it is empowered to "administer, seek to obtain compliance with, and formulate policy with respect to" the federal election campaign laws, and it has "exclusive jurisdiction with respect to the civil enforcement of such [laws]." 2 U.S.C. § 437c(b)(1). And while the independent counsel is an inferior officer "subject to removal by a higher Executive Branch official" (*i.e.*, the Attorney General), there is no such official to whom the

Commissioners are " 'inferior' in rank and authority." *Morrison*, 487 U.S. at 671.[33]

In sum, because the President has no power to remove FEC Commissioners, let alone the "at will" removal power that, we submit, the Constitution requires for principal officers performing law enforcement functions, the FECA unconstitutionally impairs the President's ability to "take Care that the Laws be faithfully executed."

2. The FECA also impermissibly limits the Executive's power under the Appointments Clause to nominate principal officers who perform executive functions. The Constitution explicitly assigns to the President illimitable power to nominate principal officers of the United States. The Act, however, provides in part that "[n]o more than 3 members of the Commission appointed under this paragraph may be affiliated with the same political party." 2 U.S.C. § 437c(a)(1).

The court of appeals held that this Appointments Clause claim was nonjusticiable, reasoning that "while such restrictions may raise serious constitutional questions, . . . it is impossible to determine in this case whether the *statute* actually limited the President's appointment power." Pet. App. 8a (emphasis in original).

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[33] The FEC argues that Article II does not require that the President be given such mechanisms for executive control where the relevant officers are appointed by the President. FEC Br. at 34 n.22. But the President's obligation to "take care that the laws be faithfully executed," *see* Art. II, § 3, cl. 4, is a continuing one; the President must, then, be able to monitor and direct his appointees. And in a more practical sense, we note that FEC Commissioners serve six-year terms; it follows that a President without at-will removal power would thus be forced to attempt to execute the laws through an officer not of his own choosing.

The court of appeals thus concluded that it could not determine whether the statute itself, or simply the President's perception of how the Senate intended to exercise its advice and consent prerogative, accounted for the Commission's perfectly bipartisan make-up.

While the Senate's advice and consent role surely provides that body determinative influence over the ultimate composition of the FEC, the Constitution grants "[n]o role whatsoever . . . either to the Senate or to Congress as a whole in the process of choosing the person who will be nominated for appointment." *Public Citizen v. U.S. Dept. of Justice*, 491 U.S. 440, 483 (1989) (Kennedy, J., concurring in the judgment).[34] And it is no answer to the Act's clear infringement of this principle to say that the President may have desired a bipartisan Commission even absent the statutory requirement to that effect. Presidents have uniformly heeded statutory bipartisan appointment requirements. And we are aware of no multimember board or Commission to which a President has made appointments on a strictly bipartisan basis in the absence of a statutory provision mandating such appointments. To profess uncertainty as to whether the law has exerted an impact on the Commission's membership is thus to close one's eyes to reality.

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[34] The exclusion of congressional influence from the nomination decision was unmistakably part of the Framers' design. *See e.g.*, The Federalist No. 66, at 449 (A. Hamilton) (J. Cooke ed. 1961) ("It will be the office of the President to *nominate*, and with the advice and consent of the Senate to *appoint*. There will be no exertion of choice on the part of the Senate. They may defeat one choice of the Executive, and oblige him to make another; but they cannot themselves *choose*: they can only ratify or reject the choice he may have made.") (emphasis in original).

Moreover, the statutory requirement constitutes a *congressional* (*i.e.*, bicameral) limitation on the President's appointment power, while only the Senate is granted advice and consent authority. Equating the statutory mandate with the possible impact of the Senate's role is thus unwarranted. Because this statutory bipartisanship requirement constitutes a congressional restriction on the President's appointment power, it violates the Appointments Clause. Accordingly, the FEC is unconstitutional, and unauthorized to initiate and prosecute this action.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

CHARLES J. COOPER*
MICHAEL A. CARVIN
WILLIAM L. MCGRATH

SHAW, PITTMAN, POTTS & TROWBRIDGE
2300 N. Street, N.W.
Washington, D.C. 20037-1128
(202) 663-8257

Attorneys for Defendants
NRA Political Victory Fund
Grant A. Wills
National Rifle Association

*Counsel of Record

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